Supreme Court, U.S.
FILED
JUL 1 1999
CLERK

(5)

No. 98-1718

In The

Supreme Court of the United States

LOUIS RHODES,

Petitioner,

v.

MARK W. KILLIAN, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arizona

PETITIONER'S REPLY BRIEF

PAUL BENDER
Attorney of Record for Petitioner Louis Rhodes
Cooperating Attorney for the Arizona Civil Liberties Union
77 East Columbus, Suite 205
Phoenix, AZ 85012
(602) 650-1854

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

633

TABLE OF CONTENTS

Page

Petitioner's Reply Brief 1

TABLE OF AUTHORITIES

CASES

Bagley v. Raymond School Dept., 728 A.2d 127 (Me., April 23, 1999) 3, 4, 5

Helms v. Picard, 151 F.3d 347 (5th Cir., 1998), *cert. granted sub nom. Mitchell v. Helms*, No. 98-1648, June 14, 1999 ..... 4, 5

Strout v. Albanese, No. 98-1986, 1999 WL 329272 (1st Cir., May 27, 1999) 3, 4, 5

STATUTES

Arizona Revised Statutes § 43-1089 2

Maine Revised Statutes, 20-A M.R.S.A. § 2951(2) 3

PETITIONER'S REPLY BRIEF

1. The Respondents opposing certiorari base their arguments on the contention that the tuition-grant funds involved in this case are the *personal funds* of individual Arizona taxpayers, who have supposedly chosen to make voluntary contributions of their own money to school tuition organizations (STOs). *See, e.g.*, Arizona Department of Revenue Brief in Opposition, p. 3: "The direct beneficiaries of the School Tuition Organizations Tax Credit are the individual taxpayers who choose to donate their personal funds to the organization." Respondent Arizona School Trust, Inc., similarly contends that "public funds simply did not find their way into private sectarian schools." Brief in Opposition, p. 13.

If these contentions were correct, this would be an entirely different case. The Establishment Clause obviously does not prohibit States from authorizing private individuals voluntarily to contribute their own funds to provide tuition for children attending religious schools. Under the Arizona legislation, however, taxpayers making $500 payments to STOs are directing *the State's money – not their own* – into religious-school tuition payments. These taxpayer "contributions" cost the taxpayers *absolutely nothing*, since each supposedly contributing taxpayer may take a dollar-for-dollar credit for the amount of the "contribution" each year against his or her State income tax bill. As strange as it may seem, the Arizona legislation challenged in this case actually permits an Arizona taxpayer who pays $500 or more in State income taxes each year to write an annual $500 check on the State treasury payable to an organization that must use that

money to pay tuition for students at religious schools.[1] The Arizona legislation thus provides for direct *State* –

---

[1] Respondent Arizona School Choice Trust, Inc., Brief in Opposition, p. 19, n.8, suggests that it is "possible to argue" that the Arizona legislation does not permit STOs to restrict their grants of funds to schools or students of only one religious denomination, but that they must make grants available to students without regard to the school the students will attend. Even if that were true, it would not change the facts that STOs are affirmatively authorized by the legislation to use tax revenues to pay tuition at religious as well as non-religious schools, and that religious schools comprise about three-quarters of the non-public schools in Arizona.

In fact, however, it is not possible to argue that each STO must make tuition grants available to children regardless of their religion and the non-public school they wish to attend. In his dissenting opinion in the Arizona Supreme Court, Justice Feldman specifically and expressly construed the Arizona legislation to permit an STO to direct "all of its grant money to a group of schools that restrict enrollment or education to a particular religion or sect. [A.R.S.] § 43-1089(E)(2). In fact, a group of taxpayers who subscribe to a particular religion may form an STO that will support only schools of that religion. Worse . . . nothing forbids an STO from limiting its grants or scholarships to students who adhere to a particular religion and will participate in the required religious observance." Pet. App. A47-A48.

Although the majority opinion in the Arizona Supreme Court responded at length to Justice Feldman's dissent, it expressed no disagreement with his interpretation of the legislation. In consequence, no Arizona court would now feel free to adopt the "possible" limiting construction offered by Respondent School Choice Trust.

Justice Feldman's construction, moreover, is compelled by the Arizona statute's explicit provision that STOs must provide tuition grants "without limiting availability to only students of one school." A.R.S. § 43-1089, reproduced at page 3 of the Petition. If STOs were required, as the School Choice Trust Brief

not private – funding of religious school tuition. As this Court has repeatedly held, the Establishment Clause prohibits such direct and unrestricted State monetary support of religious activity.

2. Since the petitions for certiorari in this case were written, decisions that directly conflict with the decision below have been rendered by the Supreme Judicial Court of Maine and the United States Court of Appeals for the First Circuit. *See Bagley v. Raymond School Dept.*, 728 A. 2d 127 (Me., April 23, 1999); *Strout v. Albanese*, No. 98-1986, 1999 WL 329272 (1st Cir., May 27, 1999).

Each of these decisions concerns Maine's education tuition program pursuant to which Maine school districts that do not have their own public schools must provide tuition grants enabling resident children to attend private schools or out-of-district public schools. Pursuant to state law, however, the district may not provide tuition for attendance at religious schools. 20-A M.R.S.A. § 2951(2). Parents of children in school districts without their own public schools who wished to send their children to religious schools challenged the constitutionality of this exclusion of religious schools from the tuition program.

---

in Opposition suggests, to provide tuition grants out of tax funds "irrespective [of] what religion, if any, operates [the] school the child wishes to attend" this statutory limitation would be completely superfluous. It is also significant that the Arizona Department of Revenue's report on 1998 STO activity (see Pet. App. A98) shows that at least 8 of the 10 STOs for which information was available award tuition grants only to students attending religious schools. The Brief in Opposition of the Department of Revenue nowhere suggests that these STOs are violating state law.

The Maine Supreme Court and the First Circuit each upheld the constitutionality of the Maine plan. Both decisions were expressly based upon the conclusion that the provision of religious school tuition by Maine school districts would violate the Establishment Clause. *See Bagley*, 728 A.2d at 144 ("[T]he tuition program, without the religious school exclusion, would indeed have the [unconstitutional] 'effect' of endorsing religion" because it "provides a direct financial subsidy to the schools."); *Strout*, 1999 Me. WL 329272, at *4. ("The historic barrier that has existed between church and state throughout the life of the Republic has up to the present acted as an insurmountable impediment to the direct payments or subsidies by the State to sectarian institutions, particularly in the context of primary and secondary schools.")

The Maine plan contains the same element of parental choice that is present in the Arizona legislation in this case. The decisions in *Bagley* and *Strout* that the Establishment Clause prohibits State funding of tuition at religious schools to which parents choose to send their children are thus in direct conflict with the decision below. The Court should grant certiorari in order to resolve that direct conflict.

3. The Court has already granted certiorari in order to review the decision of the Court of Appeals for the Fifth Circuit that the Establishment Clause is violated by governmental loans of educational or instructional equipment to sectarian schools. *See Helms v. Picard*, 151 F.3d 347, 373 (5th Cir., 1998), *cert. granted sub nom. Mitchell v. Helms*, No. 98-1648, June 14, 1999. If the Court affirms the court of appeals decision in *Helms*, that holding would apply with even greater force to this case, where State *funds* are transferred without restriction (in the form of

tuition) to religious schools. If the Court were, on the other hand, to reverse *Helms*, that decision would not resolve the Establishment Clause issue in this case or in *Bagley* or *Strout*, where State-provided tuition payments constitute completely unrestricted monetary support for all of the religious and educational programs at sectarian schools.

At the very least, therefore, the Court should hold the petitions in this case, and the petitions that will likely shortly be filed in *Bagley*[2] *and Strout*, pending the merits decision in *Helms*. It would also be appropriate, however, for the Court to grant the petitions in this case, as well as the petition in either *Bagley* or *Strout*, at the opening of the October, 1999 Term, so that the Establishment Clause issues on which a direct conflict exists can be before the Court when it considers *Mitchell v. Helms*.

4. For the foregoing reasons, as well as the reasons set forth in the petition for certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL BENDER
Attorney of Record for Petitioner Louis Rhodes
Cooperating Attorney for the Arizona Civil Liberties Union
77 East Columbus, Suite 205
Phoenix, AZ 85012
(602) 650-1854

---

[2] Respondents Lisa Graham Keegan, et al., who support the grant of certiorari here, represent the plaintiffs in *Bagley*. They state that they intend to file a petition for certiorari in *Bagley*. Respondents Keegan, et al., Statement in Response, p. 9, n.8.